

**38 CFR Part 38****RIN 2900-AR43****Requesting Disinterment of an Eligible Decedent from a National Cemetery**

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend regulations governing disinterment of eligible decedents interred in VA national cemeteries. The amendment is necessary to clarify the requirements that must be met before VA can decide a disinterment request. Clarification of the requirements will help ensure consistent administration of disinterment requests at all VA national cemeteries. Current regulations permit disinterment only when all living immediate family members of the decedent, and the person who initiated the interment (whether or not such person is a member of the immediate family), all give their written consent, or when VA receives an order from a court or State instrumentality of competent jurisdiction directing the disinterment. We propose to clarify that if the individual who initiated the interment does not consent, or is not alive to provide consent, or all living immediate family members are not in agreement, anyone seeking disinterment of an eligible decedent must obtain an order from a court or State instrumentality of competent jurisdiction to direct the disinterment. This clarification will support the regulatory principle that all burials in national cemeteries are considered permanent and final and that a disinterment will be permitted only for cogent reasons, preserve the intent of the individual who initiated the interment, and ensure that a court or other appropriate entity rather than VA will adjudicate family disputes.

DATES: Comments must be received by VA on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted through www.Regulations.gov.

Comments should indicate that they are submitted in response to “RIN 2900-AR43 – Requesting Disinterment of an Eligible Decedent from a National Cemetery.” Comments received will be available at www.regulations.gov for public viewing, inspection, or copies.

FOR FURTHER INFORMATION CONTACT: Alan Amelinckx, Management and Program Analyst, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. Email: Alan.Amelinckx@va.gov. Telephone: 202-461-5658 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Section 2400(a) of title 38, United States Code (U.S.C.), provides that NCA is responsible for the interment of deceased servicemembers and veterans. The authority to disinter, if appropriate, is a necessary and corresponding component of VA’s responsibility to inter eligible veterans or other eligible persons in a national cemetery. Interment of an eligible decedent in a national cemetery is considered permanent and final, and disinterment is approved only in limited circumstances.

Currently, VA disinterment request and review criteria are codified in 38 CFR 38.621, which states that “[d]isinterment from a national cemetery will be approved only when all living immediate family members of the decedent, and the person who initiated the interment (whether or not he or she is a member of the immediate family), give their

written consent, or when a court order or State instrumentality of competent jurisdiction directs the disinterment.” 38 CFR 38.621(a).

The regulation is not clear whether the condition of “living” also extends to the person who initiated the interment, as it does to immediate family members. Therefore, it could be interpreted that if the individual who initiated the interment is deceased and thus cannot provide written consent, VA could consider a family’s disinterment request without a court order or direction from a State instrumentality of competent jurisdiction if all living immediate family members of the decedent give their written consent.

To eliminate ambiguity, VA proposes to clarify in § 38.621(a) and (b) that if the individual who initiated the interment does not consent, or is not alive to provide consent, or all living immediate family members are not in agreement, anyone seeking disinterment of an eligible decedent must seek a court order or State instrumentality of competent jurisdiction to direct the disinterment. This change supports the regulatory principle that all burials in national cemeteries are considered permanent and final and that a disinterment will be permitted only for cogent reasons, preserves the intent of the individual who initiated the interment, and ensures a deliberative court or administrative process that is better suited than VA to adjudicate family disputes.

In addition to revising the regulatory text for disinterment requests, VA would revise VA Form 40-4970, Request for Disinterment, to reflect the changes to the regulatory text. VA also proposes to add a provision in § 38.621(b)(2) stating: “If the person provides a false certification on VA Form 40-4970, he or she may be subject to penalties, to include fine or imprisonment or both.” VA would revise VA Form 40-4970 to include such a penalty statement. This change is necessary because VA Form 40-4970 does not contain this penalty statement, which appears on most other burial and memorialization forms. In addition to making it consistent with other forms, the addition of the penalty statement to VA Form 40-4970 would help dissuade requestors from

submitting the form without the required endorsement of the individual who initiated the interment and all living family members.

We also note the current version of 38 CFR 38.621 uses the title “National Cemetery Area Office Director,” but since 1998, that title has not been used and has been replaced by the current title “National Cemetery District Executive Director,” which would be used in the updated regulation.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). This certification is based on the fact that most disinterment requests are submitted by families. Although local courts and State instrumentalities may be involved if family members differ on a contemplated disinterment action, processing and adjudicating those requests for a

court-ordered disinterment would likely be rare and would be conducted as part of that entity's routine operations. VA cannot estimate the number of entities that may be affected by this proposed rule given that each disinterment case is based on the unique needs of families. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This proposed rule includes provisions that would amend a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that is currently approved by the Office of Management and Budget (OMB) under OMB control number 2900-0365. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking to OMB for review and approval.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. If OMB does not approve the collection of information as requested, VA will immediately remove the provisions containing the collection of information or take such other action as is directed by OMB.

Proposed § 38.621 would require revision of the instructions on VA Form 40-4970 to require an order from a court or State instrumentality of competent jurisdiction if a living immediate family member will not provide consent to the disinterment, or if the person who initiated the decedent's burial request will not provide consent to the disinterment or is deceased and cannot provide consent to the disinterment. The proposed rule would also revise the form to add a penalty statement for false certifications on the form.

The proposed revision to the form instructions and addition of a penalty statement would not increase or decrease the number of respondents using VA Form 40-4970. Therefore, these proposed revisions would not result in any increase or decrease in respondents, respondent burden hours, or respondent burden costs.

Comments on the revised collection of information contained in this rulemaking should be submitted through www.regulations.gov. Comments should indicate that they are submitted in response to "RIN 2900-AR43, Requesting Disinterment of an Eligible Decedent from a National Cemetery" and should be sent within 60 days of publication of this rulemaking. The collection of information associated with this rulemaking can be viewed at: www.reginfo.gov/public/do/PRAMain.

OMB is required to make a decision concerning the collection of information contained in this rulemaking between 30 and 60 days after publication of this rulemaking in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the provisions of this rulemaking.

The Department considers comments by the public on a revised collection of information in—

- Evaluating whether the revised collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the revised collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The collection of information associated with this rulemaking contained in 38 CFR 38.621 is described immediately following this paragraph, under its respective title.

Title: Request for Disinterment.

OMB Control No: 2900-0365

CFR Provision: 38 CFR 38.621

- Summary of collection of information: The revised collection of information in proposed 38 CFR 38.621 would require an individual requesting disinterment to obtain consent from all living immediate family members of an eligible decedent and from the individual who originally requested the decedent's burial. If a living immediate family member will not provide consent to the disinterment, or the individual who requested the decedent's burial will not provide consent to the disinterment or is deceased and cannot provide consent to the disinterment request, the requester would be required to obtain an order from a court or State instrumentality of competent jurisdiction to direct disinterment. The proposed rule would also revise the form to include a penalty statement for false certifications.

- Description of need for information and proposed use of information: The information will be used by VA to determine whether to approve a disinterment request.
- Description of likely respondents: Personal representatives and family members of eligible Veterans and other eligible individuals who are interred in national cemeteries.
- Estimated number of respondents: 1,777 in FY2019.
- Estimated frequency of responses: One time per application as needed by families.
- Estimated average burden per response: 10 minutes for respondents.
- Estimated total annual reporting and recordkeeping burden: VA estimates the total annual reporting and recordkeeping burden to be 296 hours.
- Estimated cost to respondents per year: VA estimates the annual cost to respondents to be \$8,012 (296 burden hours for respondents x (multiplied by) \$27.07 per hour).

Assistance Listing

The Assistance Listing number and title for the programs affected by this document are 64.201, National Cemeteries.

List of Subjects in 38 CFR part 38

Administrative practice and procedure, Cemeteries, Claims, Crime, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on February 1, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts

*Regulation Development Coordinator,
Office of Regulation Policy & Management,
Office of General Counsel,
Department of Veterans Affairs.*

For the reasons set forth in the preamble, 38 CFR part 38 is proposed to be amended as follows:

PART 38 – NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

1. The authority citation for part 38 continues to read as follows:

AUTHORITY: 38 U.S.C. 107, 501, 512, 2306, 2400, 2402, 2403, 2404, 2407, 2408, 2411, 7105.

2. Revise § 38.621 to read as follows:

§ 38.621 Disinterments.

(a) Interments of eligible decedents in national cemeteries are considered permanent and final. Disinterment will be permitted only for cogent reasons and with the prior written authorization of the National Cemetery District Executive Director or Cemetery Director responsible for the cemetery involved. Disinterment from a national cemetery will be approved only when:

(1) A court order or State instrumentality of competent jurisdiction directs the disinterment; or

(2) All living immediate family members of the decedent, and the individual who initiated the interment (whether or not the individual is a member of the immediate family), give their written consent.

(i) If the individual who initiated the interment does not consent, or is not alive to provide consent, or all living immediate family members are not in agreement, anyone seeking disinterment of an eligible decedent must provide VA with an order from a court or State instrumentality of competent jurisdiction to direct the disinterment as provided in paragraph (a)(1) of this section.

(ii) For purposes of this section, “immediate family members” are defined as surviving spouse, whether or not he or she is or was remarried; all adult children of the decedent; the appointed guardian(s) of minor children; and the appointed guardian(s) of the surviving spouse or of the adult child(ren) of the decedent. If the surviving spouse

and all of the children of the decedent are deceased, the decedent's parents will be considered "immediate family members."

(b)(1) All requests to disinter remains as described in paragraph (a)(2) of this section must be submitted on VA Form 40-4970, Request for Disinterment, and must include the following information:

(i) A full statement of reasons for the proposed disinterment.

(ii) Notarized statement(s) by all living immediate family members of the decedent, and by the person who initiated the interment (whether or not the individual is a member of the immediate family), that all parties consent to the proposed disinterment.

(iii) A notarized statement by the person requesting the disinterment that those who supplied affidavits comprise all the living immediate family members of the deceased and the individual who initiated the interment.

(2) If the person provides a false certification on VA Form 40-4970, he or she may be subject to penalties, to include fine or imprisonment or both.

(c) Any VA-approved disinterment in this section must be accomplished without expense to the Government.

(The reporting and recordkeeping requirements contained in paragraph (b) of this section have been approved by the Office of Management and Budget under OMB control number 2900-0365)

(Authority: 38 U.S.C. 2404)

[FR Doc. 2022-02682 Filed: 2/8/2022 8:45 am; Publication Date: 2/9/2022]